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No. 06-219

IN THE

Supreme Court of the United States

CHARLES WILKIE, ET AL.,
Petitioners,

v.

HARVEY FRANK ROBBINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL WILDLIFE FEDERATION, PUBLIC LANDS FOUNDATION, AND WYOMING WILDLIFE FEDERATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BRIEF OF THE NATIONAL WILDLIFE FEDERATION, PUBLIC LANDS FOUNDATION, AND WYOMING WILDLIFE FEDERATION AS *AMICI CURIAE* SUPPORTING PETITIONER

INTERESTS OF *AMICI*

Amicus curiae the National Wildlife Federation (NWF) is a private not-for-profit conservation education organization dedicated to the wise use of our Nation's natural resources.[1] NWF has members in all fifty states, including members who live in Wyoming. NWF's members use the public lands and

[1] Pursuant to Supreme Court Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. See S.Ct.R. 37.3(a).

actively participate in public lands management issues. NWF has worked for years for responsible management of the public lands.

Amicus curiae the Public Lands Foundation (PLF) is a national non-profit, 501(c)(3) organization now in its 20th year of operation since being incorporated in the State of Virginia. Its more than 1000 volunteer members are retired former Bureau of Land Management (BLM) employees representing an extensive, broad cross-section of knowledge and expertise in the management of all the multiple uses of public lands. The majority of the membership are former District Managers, State Directors and Natural Resource Specialists. The mission of the Foundation is to support professional management of the public lands by professionals, and the Foundation is dedicated to the ecological stability of the public lands managed by the BLM.

Amicus curiae the Wyoming Wildlife Federation (WWF) is Wyoming's largest and oldest statewide sportsmen's conservation organization. The Wyoming Wildlife Federation works for hunters, anglers, and other wildlife enthusiasts to protect and enhance habitat, to perpetuate quality hunting and fishing, to protect citizen's rights to use public lands and waters, and to promote ethical hunting and fishing.

Amici's interests lie neither with the government nor with landowners in particular, but with the responsible management of public lands. *Amici* are thus in a balanced position, as *amici curiae*, to address the proper scope and limits of private rights of action as applied to public officials' negotiations with others over property rights.

STATEMENT

The decision below creates new private damages actions under the Hobbs Act against individual government employees for actions taken in the exercise of lawful regulatory authority, based solely on the plaintiff's subjective

claims of extortionate intent. The decision also makes available against individual government employees a *Bivens* cause of action to enforce the newly crafted Takings Clause-based right to be free from retaliation for attempts to exclude the government from private property. If not reversed, the court of appeals' decision may create an opportunity for persons subject to regulation to bypass statutory and regulatory mechanisms established for administrative and judicial review of regulatory actions, and will create a powerful incentive for federal officials to refrain from zealously carrying out their regulatory duties due to the threat of personal liability.

SUMMARY OF ARGUMENT

The Tenth Circuit erroneously created a new private RICO action against government officials performing their statutory and regulatory duties. After *Robbins*, a government official exercising his or her statutory duties in a property dispute may be personally liable for treble RICO damages if the official acted with an "intent to extort." Pet. App. 18a. Incredibly, an official performing only lawful actions will be labeled as a racketeer *based solely on his alleged motive for performing the lawful actions*. If left unchecked, the end result of *Robbins* will be the punishment of government officials who, within the scope of their authority, aggressively perform their jobs. Congress could not have intended—or even imagined—that result.

Before *Robbins*, extortion under color of official right occurred when a government official took property without lawful authority to do so, or took property using wrongful means—such as threats, violence, or other force. Absent performing a wrongful action, a government official was not an extortionist.

Further, before *Robbins*, government officials enjoyed a qualified immunity insulating their discretionary actions from

personal liability so long as their actions did not violate clearly established law. Qualified immunity struck a balance between citizens' rights and the officials' entitlement to perform their jobs free from undue outside influences. But then came *Robbins*, which, through a single, improper act of judicial legislation, upset this carefully constructed balance.

After *Robbins*, a government official exercising regulatory authority is an extortionist if the official performs his duties with an "intent to extort." In other words, the official's subjective motive, rather than objective actions, is the dispositive object of inquiry. *Robbins* extortion may be found not only when a government official takes (or attempts to take) property, but also when a government official withholds the granting of a reciprocal easement onto government property. An aggressive official duly performing his or her job will be personally liable for extortion, yet the underachieving official will be rewarded. This perverse result cannot be condoned by the Court.

This "intent to extort" test is erroneous for two reasons. First, the court of appeals improperly injected motive as a dispositive element of extortion. This judicial legislation is particularly appalling because the predicate for petitioners' RICO liability is a finding of extortion based on the Hobbs Act—a criminal statute. Thus, the *Robbins* extortion created by the Tenth Circuit is a basis for both civil and criminal liability. Yet creating criminal liability is the province of the legislature, not the judiciary. Second, a finding of an "intent to extort" is a purely factual and subjective inquiry devoid of an objective analysis of unlawful actions. In short, an official is an extortionist if he believes himself to be one; otherwise he is not. This nebulous and circular definition of extortion fails to provide reasonable and intelligible standards to guide officials as to what actions are legal or illegal, and should be eradicated by the Court.

The court of appeals compounded its error by finding that *Robbins* extortion was "clearly established" law at the time the petitioners took the allegedly extortionate actions. Pet. App. 22a. To the contrary, what was clearly established law was that extortion was based on unlawful predicate acts. No reasonable government official would have known—let alone imagined—that lawful actions performed under regulatory authority during the course of one's job would have constituted extortion. Thus, even assuming *Robbins* extortion is good law today (which it is not), it certainly was not clearly established law when the petitioners took the actions that formed the basis of this suit.

The creation of *Robbins* extortion will chill a governmental official's ability to aggressively perform his or her job in a property dispute. The court of appeals' decision ensures that a government official will face personal liability based only on an allegation of an "intent to extort." Knowing that the end result of a decision may ultimately be an allegation of extortion, a government official will be reticent—if not downright afraid—to perform job duties in property disputes. And this decision will potentially reach well beyond real property disputes, including, among others, disputes involving Internal Revenue investigations and claims of patent, copyright, and trademark infringement.

But the court of appeals did not stop there; indeed, its decision on respondent's *Bivens* claim will only exacerbate the chilling effect of its RICO holding. Stunningly, the court of appeals accepted respondent's claim that, under the Takings Clause, he had a constitutional "right to exclude" the government from his property and a constitutional right to be free from retaliation for the exercise of his Takings Clause-based "right to exclude." And even though the court of appeals had never recognized either the underlying Takings Clause right or an anti-retaliation right for the Fifth Amendment generally, the court further held that such

rights were "clearly established law," vitiating the petitioners' immunity. Moreover, the court of appeals created *Bivens* liability for individual federal officers for its newly crafted right without any regard to the pre-defined remedy for Takings Clause violations set forth in the Constitution and made available against the United States by statute.

These holdings lack any basis in precedent. It is black-letter law that the Takings Clause does not confer a "right to exclude" but rather the right to be compensated for a taking. And even if the Takings Clause were as broad as respondent alleges, all violations of the Takings Clause present special factors that preclude the judicial creation of a cause of action against individual federal officials under *Bivens*. Thus, the court of appeals' unprecedented acceptance of respondent's *Bivens* claim should also be reversed.

ARGUMENT

I. THE COURT OF APPEALS' IMPOSITION OF RICO LIABILITY IS BASED ON AN UNJUSTIFIED EXPANSION OF EXTORTION UNDER THE HOBBS ACT.

The court of appeals' holding that a government official may be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, by performing the predicate act of extortion under color of official right *despite taking no unlawful action*, should be reversed. Until this remarkable decision, a government official acting under color of official right violated the Hobbs Act only when that official attempted to take, or actually took, property from another *without legal authority to do so*. In *Robbins*, however, the court of appeals created another violation of the Hobbs Act—namely, an otherwise lawful taking with "extortionate intent." This newly crafted extension of RICO liability, which could be called "*Robbins* extortion," transforms hard-working regulators into racketeers premised solely on their alleged state of mind. This is contrary to a

reasonable interpretation of the law. See, *e.g.*, *Sinclair* v. *Hawke*, 314 F.3d 934, 943-944 (CA8 2003) ("[B]ank regulators do not become racketeers by acting like aggressive regulators.").

Moreover, the reach of *Robbins* extortion extends well beyond petitioners' civil liability under RICO, and further implicates criminal liability. The petitioners' RICO liability is predicated upon an act that is indictable under the Hobbs Act. 18 U.S.C. §1961(1)(a) and (b). The Hobbs Act, in turn, provides that extortion is punishable by criminal or civil penalties. 18 U.S.C. §1951. Thus, by misconstruing the Hobbs Act to create a novel species of extortion-like activity, the court of appeals' ruling enlarged the scope of actionable conduct under that statute. Because violations of the Hobbs Act provide a basis for criminal sanctions, the court of appeals' ruling effectively creates a new crime. This "judicial legislation under the guise of construction" is outside the boundaries of the court's authority and is erroneous as a matter of law. *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

A. Government Officials Do Not Violate the Hobbs Act by Using Lawful Regulatory Authority To Take Property That the Government Has a Right To Receive.

The Court need look no further than the text of the Hobbs Act to determine that government officials acting pursuant to their regulatory authority do not, as a matter of law, perform the predicate act of extortion under this statute.

1. Government Official Actions Taken Pursuant to Statutory Powers Cannot Form the Basis of an Extortion Claim.

The Hobbs Act expressly defines "extortion" as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. §1951(b)(2).

Extortion under color of official right, in turn, is defined as "the use by a public official or employee of the power and authority of the office *[he] [she]* occupies in order to obtain money, property, or something of value from another to which that government official or employee or that government office *have no official right*." 2A K. O'Malley, et al., Federal Jury Practice & Instructions §53.09 (5th ed. 2006) (defining extortion under color of official right) (alternation in original) (second emphasis added); see also *e.g.*, *United States* v. *Cerilli*, 603 F.2d 415, 419-420 (CA3 1979) (holding that seeking payments under the guise of political contributions was extortion). "[A] public official [who] has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts*" is an extortionist. *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (emphasis added). *See also United States* v. *Kenny*, 462 F.2d 1205, 1229 (CA3 1972) ("Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office.").

The key to extortion in the context of public officials, then, is the abuse of official power to obtain something to which the public official has no right. For example, a public official extorts when exacting a payment "for the promise to perform (or not perform) an official act." *McCormick* v. *United States*, 500 U.S. 257, 273-274 (1991) (internal quotation marks omitted) (holding that a *quid pro quo* is a necessary element of extortion when a government official receives a campaign contribution). Consistent with this basic concept, no authority supports "the proposition that federal employees who take regulatory action *consistent with their statutory powers* engage in a 'pattern of racketeering activity' [merely because] those actions are adverse to a particular industry or business activity." *Sinclair*, 314 F.3d, at 943-944 (emphasis added). Indeed, as the Third Circuit explained when rejecting such a proposition in *Sinclair*, "the proposition is ludicrous on its face." *Ibid.*

2. Government Officials Enforcing Governmental Property Rights Are Not Extortionists.

By the same token, no court (other than the court of appeals in *Robbins*) has ever held that the government extorts property when it acts as a property owner and seeks reciprocal rights-of-way in exchange for a grant of a right-of-way across public lands, as in the present case.[2] To the

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[2] As this Court has recognized, the history of the settlement of "the territory we now regard as the American West" has led to a vast patchwork of intermingled public and private land holdings, much like the lands implicated in this case. *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672 (1979). In many cases, Congress instituted a "'checkerboard' land-grant scheme," whereby land granted to transcontinental railroads was divided into "checkerboard" blocks, with odd-numbered lots granted to the railroad and even-numbered lots retained by the Government. *Id.*, at 672. As the Court noted in *Leo Sheep*, "[a]s a result, [railroad] land in the area of the right-of-way was usually surrounded by public land, and vice versa." *Ibid.* In addition to the "checkerboards" created by railroad land grants, many other public and private lands are substantially intermingled and interdependent for access. In 1992, the General Accounting Office found that some fifty million acres of public lands had inadequate legal public access, largely due to the unwillingness of private landowners to provide such access. *See* U.S. Gen. Accounting Office, Federal Lands: Reasons for and Effects of Inadequate Public Access, GAO/RCED-92-116BR, (April 1992). Congress has also recognized the needs of private landowners to obtain access across federal lands, see, *e.g.*, Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §3210(a) (instructing Secretary of Agriculture to provide access to nonfederally owned land within the boundaries of the National Forest System), Federal Land Policy and Management Act of 1976, 43 U.S.C. §1761(a) (authorizing Secretary of the Interior to grant, issue, and renew rights-of-way across public land), as well as prohibiting the enclosure (by fencing) of "land-locked" public lands, *see* Unlawful Inclosures Act, 43 U.S.C. §1061, *Camfield* v. *United States*, 167 U.S. 518 (1897). As a result the historical events that led to of this patchwork of public and private lands, the use of reciprocal rights-of-way to ensure both public and private access is a long-recognized process and one expressly authorized by BLM regulations. *See* 43 C.F.R. §2801.1-2 (authorizing BLM officials

contrary, caselaw supports the opposite conclusion. In *Washoe County*, the appellants unsuccessfully sought a right-of-way permit across government land. *Washoe County* v. *United States*, 319 F.3d 1320, 1327-1328 (CA Fed. 2003). The denial of Washoe County's right-of-way application was not a regulatory taking because the government "acting as a landowner" did not "impose[] regulatory restrictions on the use of Appellants' private property." *Ibid.* It is axiomatic that absent a taking of property (or attempted taking) extortion cannot lie.

Similar to *Washoe County*, the petitioners—acting on behalf of the government as landowner—did not take respondent's property. Rather, the petitioners were authorized to obtain reciprocal easements and grant right-of-ways across public land,[3] to access respondent's land,[4] and to file trespass charges against the respondent.[5] Because respondent failed to make the required annual payment for its right-of-way onto government property and refused to grant the government a reciprocal easement, the BLM canceled the respondent's right-of-way across public lands. Pet. 5. Since the

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to require applicants for right-of-way grants "as a condition to receiving a right-of-way grant, to grant the United States an equivalent right-of-way").

[3] 43 C.F.R. §2801.1-2.

[4] 43 C.F.R. §4130.3-2(h) (stating that "permittees or lessees shall provide reasonable administrative access across private and leased lands to the Bureau of Land Management for the orderly management and protection of the public lands").

[5] 43 C.F.R. §2801.3(a) (defining as a trespass any use of public lands requiring a right-of-way without authorization); 43 C.F.R. §2920.1-2(a) (defining as trespass any use of public lands, other than casual use, without authorization under specified procedures); 43 C.F.R. §4140.1(b)(i) (prohibiting anyone from allowing livestock to use BLM lands without permit, lease, or other authorization).

government officials did not take (or attempt to take) respondent's property, extortion cannot be found.

The *Robbins* panel, however, concluded that the petitioners' actions taken on behalf of the government as landowner and pursuant to well-established regulations resulted in extortion and violated clearly established law. But it is preposterous to hold that a governmental official who is merely performing his or her job within statutory and regulatory authority is properly labeled an extortionist.

B. The Court of Appeals for the Tenth Circuit Interpreted the Hobbs Act Too Broadly By Adding a Category of Liability Based Solely on "Extortionate Intent."

After conceding that regulatory authority may have existed for each of the allegedly extortionate acts on which respondent's RICO claims are based, the court of appeals nonetheless held that the petitioners could still perform the predicate act of extortion under color of official right. Pet. App. 17a-18a. To do so, the court rewrote the Hobbs Act to cover taking property under lawful authority if done with a particular motive. Thus, according to the court of appeals, *Robbins* extortion arises when a government official takes an otherwise lawful action with an "intent to extort." The court reasoned that performing lawful acts with an "intent to extort" meets the predicate act of extortion under color of official right: "[W]e conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." Pet. App. 18a.

In essence, the court of appeals held that performing lawful actions for the purpose of extorting property is extortion. But if those same lawful acts are performed merely for

the purpose of taking property pursuant to government regulations, then no extortion is possible.

And in so doing, the court of appeals confused the legal concepts of "motive" and "intent." "[M]otive" is "the inducement to do some act," whereas "intent" is the "mental resolution or determination to do [some act]." Black's Law Dictionary 813 (7th ed. 1999). Thus, motive is the purpose or reason for taking an action, but intent is the mental state associated with actually taking an action. Whether a government official taking lawful actions is "carrying out regulations intending to extort property" or "carrying out regulations intending to take property," that governmental official's intent is the same. The official's *intent* is the intent to perform the particular actions; the only difference is the official's *motive* for doing so. Thus, when the court of appeals referred to "extortionate *intent*," it actually meant "extortionate *motive*."

Before *Robbins*, courts recognized that "[e]vidence of motive is not relevant to any element of Hobbs Act extortion." *United States* v. *Agnes*, 581 F.Supp. 462, 477 (EDPA 1984). Extortion could not lie where a government official acquired property by taking authorized actions pursuant to his or her statutory or regulatory authority. But after *Robbins*, a finding of extortion under the Hobbs Act can be based solely upon lawful actions taken by the official, depending only on the official's motive. By so holding, the court of appeals turned what had been an irrelevant factor to Hobbs Act extortion—motive—into a case-dispositive one, capable of turning lawful acts of a government official into crimes. Although the court of appeals framed its analysis in terms of intent, the court held that lawful actions performed with a motive to extort automatically transmutes those otherwise lawful actions into unlawful extortion. Pet. App.

18a. But just as thoughts alone cannot be crimes[6] and lawful actions alone cannot be crimes, the combination of allegedly improper thoughts with lawful actions cannot be a crime.

Properly construed, the Hobbs Act is violated upon the *unlawful* taking of property under color of official right. 18 U.S.C. §1951. The Hobbs Act covers "those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States* v. *Enmons*, 410 U.S. 396, 400 (1973). For example, extortion occurs when the wrongdoer takes property that he or she has no right to claim. *Cerilli*, 603 F.2d, at 419-420. Extortion may also occur if a person uses physical violence to take property, even if he has a rightful claim to that property. *United States* v. *Warledo*, 557 F.2d 721, 730 (CA10 1977) (finding extortion based on using violence to receive property). This is because the wrongful act of violence transforms the otherwise lawful act of taking into an unlawful act of extortion.

The *Cerilli* and *Warledo* line of cases support this reading of the Hobbs Act. These cases stand for the proposition that extortion requires either (1) taking of property absent a lawful claim to that property or (2) an otherwise lawful taking of property accompanied by an act that causes violence or fear.

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[6] United States law has long eschewed criminalizing a mere state of mind. See Model Penal Code §2.01, cmt. 1 (1985) ("It is fundamental that a civilized society does not punish for thoughts alone."); Brenner, Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?, 13 Alb. L.J. Sci. & Tech. 273, 364 (2003) ("Criminal liability is imposed for what one does or endeavors to do, not for what one thinks or would think, if certain notional ideas were available as part of the public discourse. This is because substantive criminal law incorporates the concept of free will. Notional ideas and thoughts about notional ideas cannot themselves inflict any of the socially intolerable types of harm that societies must proscribe to survive, but actions can. Therefore, criminal liability is imposed only when thoughts are translated into proscribed actions.") (footnotes omitted).

In either case extortion cannot be found unless the defendant performed an unlawful act. "[T]o hold that [government regulators] commit the federal crime of extortion when they act [pursuant to government regulations] . . . is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'" *McCormick*, 500 U.S., at 272.

Notably, motive is absent from the text of the Hobbs Act. And basic principles of statutory construction prohibit rewriting the statute to add motive as an element of the Hobbs Act. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). The court of appeals' ruling was improper because it resulted "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) (internal quotation marks omitted, other alterations in original).

Despite performing only lawful actions, the petitioners nevertheless face treble RICO damages upon a bare allegation of a motive to extort. "By these claims, Mr. [Robbins] seeks to have a jury decide whether [petitioners'] facially lawful regulatory actions were the product of unlawful motive. . . . [S]uch judicial review of the actions of [the petitioners] . . . would be unprecedented." *Sinclair*, 314 F.3d, at 939. Governmental officials who diligently perform their jobs have never been, until *Robbins*, extortionists.

C. Qualified Immunity Should Not Have Been Denied Because *Robbins* Extortion Was Not "Clearly Established" Law When Petitioners Performed the Alleged Extortionate Acts.

Even assuming that the court of appeals correctly determined that an otherwise lawful taking of property by a government official with an extortionate motive violates the Hobbs Act, the court of appeals erred in denying qualified immunity. Even when a plaintiff has properly alleged a violation of a constitutional right, a government official is entitled to qualified immunity unless the plaintiff can also show that the "law *clearly established* that the [official's] conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). To be clearly established sufficient to justify a denial of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

What was clearly established prior to *Robbins* was that obtaining property only through an illegal action—an action involving violence, threats, fear, or receiving property not under an official right—is extortion. That is, until *Robbins*, no court recognized that extortion also applies to attempted takings of property by a government official whose actions were specifically authorized by statutes and regulations. Pet. App. 21a (acknowledging that "no court [] rejected the claim of right defense under circumstances identical to the ones presented by this case."). Therefore, before *Robbins*, no reasonable governmental official informed of Hobbs Act case law would have ever imagined lawful actions taken pursuant to duly promulgated regulations could fall within the scope of the prohibition of the criminal Hobbs Act. To do so would sweep both lawful and unlawful actions—essentially every action a government official takes—within the ambit of the

Hobbs Act. Indeed, pre-existing case law characterized such a result as "ludicrous on its face." *Sinclair*, 314 F.3d, at 934.

In light of the pre-existing contours of Hobbs case law, qualified immunity should be afforded to petitioners. Simply put, there was no way reasonable government officials could have anticipated that their actions that were lawful pre-*Robbins* might suddenly become unlawful post-*Robbins*. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as" the government official acts within his or her statutory authority. *McCormick*, 500 U.S., at 272. Consequently, the petitioners' conduct could not have violated clearly established law, and, at a minimum, the denial of qualified immunity should be reversed.

D. Expanding Hobbs Extortion To Include Lawful Actions Will Adversely Impact Government Regulators.

Finally, expanding Hobbs extortion to include actions taken pursuant to lawful government authority will send shock waves through governmental agencies who routinely interact with the public. This remarkable and erroneous decision, if not overturned, will impact a wide array of government officials by severely hampering their ability to perform their jobs.

1. Upholding *Robbins* Extortion Will Have a Chilling Effect on Regulatory Government Officials.

A governmental official exercises discretion in many, if not most, official decisions. The exercise of discretion, especially when a government official is negotiating property rights, creates a tense relationship between a property owner and a government official. This relationship is emotional

and strained at best. Moreover, "judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). In light of this contentious environment, discovery into the motive of a decisionmaker may be boundless. "Inquiries of this kind can be peculiarly disruptive of effective government." *Id.*, at 817.

The court of appeals' holding will expose government regulators to potential personal liability under RICO anytime that regulators' disputes with citizens involve property. These acrimonious property disputes are fertile grounds for alleging that the government official made a discretionary decision with a bad motive. And under *Robbins*, a mere allegation of "extortionate intent" will be sufficient to haul a government official into court to face racketeering charges. Given this reality, the *Robbins* decision could perversely condone a form of extortion claims to coerce governmental officials to take or refrain from engaging in lawful regulatory activities. And, in turn, the looming threat of personal liability will surely "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow*, 457 U.S., at 814 (internal quotation marks omitted, other alterations in original). If left unchecked, the court of appeals' decision will chill federal employees' diligent performance of their regulatory duties. To prevent such a preposterous result, governmental employees must have discretion to perform their lawful job functions without the threat of ruinous personal litigation.

Under the court of appeals' view, extortion may hinge on the thoughts, rather than the actions of a government official. Performing actions according to law will not protect a regulator from a RICO charge. Identical conduct may lead to different outcomes depending on the state of mind of the defendant. This uncertainty in identifying extortionate conduct will further impede a regulator from performing his

or her lawful duties. Furthermore, a state of mind analysis is a subjective inquiry. And in *Harlow*, the Court previously rejected a subjective-based analysis of official behavior: "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S., at 818 (footnote omitted). The Court should bury the nebulous subjective intent test in favor of an objective test that focuses on a government official's actions rather than thoughts.

2. A *Robbins* Extortion Allegation Vitiates the Qualified Immunity Privilege of Government Officials.

A government official's qualified immunity defense seeks to strike a balance between a citizen's constitutional rights and a government official's ability to adequately perform his or her job. *Anderson*, 483 U.S. 635, at 639. Qualified immunity responds to the "concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen* v. *City of Independence*, 445 U.S. 622, 655-656 (1980). Indeed, qualified immunity "should avoid the excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. 800, at 818.

The court of appeals equated a lawful attempt to obtain property while having an allegedly "extortionate intent" with unlawful taking of property under color of official right. Pet. App. 22a. By so doing, the court employed a test of clearly established law that bore "no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."

Anderson, 483 U.S., at 639. Under *Robbins*, a plaintiff's RICO claim is sufficient if the plaintiff alleges that the official performed lawful duties with an extortionate motive. Because proof of motive is a fact-intensive subjective inquiry, creative plaintiffs could easily allege an extortionate motive sufficient to withstand summary judgment. And without the ability to dispose of such a case before trial, the government official facing a *Robbins* extortion charge thus has essentially lost his or her qualified immunity. See *Saucier*, 533 U.S., at 200-201 ("The [qualified immunity] privilege is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.") (internal quotation marks omitted, emphasis in original). The court of appeals transformed qualified immunity into "unqualified liability simply by [a plaintiff] alleging" an extortionate intent. *Anderson*, 483 U.S., at 639.

3. *Robbins* Extortion Will Touch Many, If Not Most, Government Officials Who Negotiate Property Rights With Others.

These *Robbins* extortion actions will arise in many contexts. Cases involving an actual or attempted regulatory or physical taking of real property are prime candidates for contentious dealings leading to allegations of extortionate intent. But the potential swath of *Robbins* sweeps much wider. For example, since IRS investigations typically involve monetary and other property disputes, a *Robbins* extortion action could be filed on behalf of a taxpayer against an IRS agent. But cf., *Fishburn* v. *Brown*, 125 F.3d 979, 983 (CA6 1997) (declining to extend a *Bivens* action to an IRS agent's actions taken in a taxpayer dispute).

And the possibilities do not stop there. Whenever a property right is at stake, RICO liability will become an issue. RICO liability may also be found in cases involving intellectual property infringement claims asserted against the

government, social security cases, government seizure of property, welfare benefits cases, and denial of insurance claims, such as Medicare and Medicaid. Each and every property dispute potentially could spawn a *Robbins* action.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S TAKINGS CLAUSE-BASED RETALIATION CLAIM WAS ACTIONABLE UNDER *BIVENS*.

Although the court of appeals' RICO holding was grievously erroneous, its holding on respondent's *Bivens* claim was perhaps no less so. It is important to start by clarifying the true scope of respondent's claim. Even though the court of appeals' *Bivens* holding speaks of respondent's alleged "Fifth Amendment" rights, the only portion of that amendment that relates to his claim is the Takings Clause. Thus, his claim is best described as being based on the Takings Clause, and not the broader Fifth Amendment.[7]

In an unprecedented decision, the court of appeals accepted respondent's claim. The court held that (1) the Takings Clause conferred upon respondent the "right to exclude" the government from his property, as well as to be free from retaliation for the exercise of his Takings Clause-based "right to exclude"; and (2) that these newly crafted rights were "clearly established law."

This was reversible error. As this Court has explained, it is a "basic axiom" that the Takings Clause does not confer a "right to exclude" but, rather, the right to be *compensated* for *a taking*. And whatever the breadth of right conferred by the Takings Clause, violations of the Takings Clause necessarily present special factors precluding judicial creation of a *Bivens* claim against individual federal officials. Thus, the court of

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[7] Reference to the Takings Clause rather than the Fifth Amendment will also avoid confusion with the Court's precedent on the availability of a *Bivens* claim under the Fifth Amendment's Due Process Clause. See *Davis* v. *Passman*, 442 U.S. 228, 243-244 (1979).

appeals' extraordinary holding on respondent's *Bivens* claim should also be reversed.

A. The Takings Clause Does Not Confer the "Right to Exclude" but, Rather, the Right to Be Compensated for a Taking—And Respondent Has Not Alleged a Violation of That Right.

Contrary to the court of appeals' holding, the Takings Clause provides no right to exclude the government from private property. The court of appeals correctly concluded that there is a "right to exclude" others—whether private citizens or government officials—from one's property. Pet. App. 12a-13a. Where it erred, though, was in holding that this right was provided by the Fifth Amendment. *Id.*, at 13a-15a. It is a "basic axiom that [p]roperty interests . . . are not created by the Constitution." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotation marks omitted, other alterations in original). "Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Ibid* (internal quotations marks omitted).

The Takings Clause neither provides individuals with the right to exclude the government from their property, nor confers what would be the more narrow (and far more constitutionally tethered) right to prevent the government from lawfully taking their property for public use. Instead, the right provided by the Takings Clause is the right to *seek compensation* when the government takes property for public use:

> "[A]s the Court has frequently noted, [the Takings Clause] *does not prohibit the taking of private property*, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se,

> *but rather to secure compensation in the event of otherwise proper interference amounting to a taking.*" *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314-315 (1987) (citations omitted, emphasis added).

Because no taking occurred here, petitioners did not violate the right protected by the Takings Clause. And given that respondent had no right under the Takings Clause to exclude the government from his property, he certainly had no right under the Takings Clause to be protected from government "retaliation" for his attempts to exclude the government from his property.

Moreover, even if the Takings Clause did confer an anti-retaliation right, that right would not extend to respondent. As explained above, landowners do not have a right under the Takings Clause to prevent the government from taking their land for public use, but only to seek compensation for such a taking. As such, if the Takings Clause did protect against retaliation for the exercise of rights protected thereby, such protection might well extend to retaliation directed towards a landowner's attempt to receive just compensation for a taking. But it would not encompass retaliation directed towards a landowner's efforts to *prevent* the taking from occurring altogether.

B. "Special Factors" Separate from the Administrative Procedure Act Preclude *Bivens* Liability for a Takings Clause Violation.

Regardless of whether the Takings Clause in fact protects against retaliation for the exercise of rights protected thereby, such a result would not support a *Bivens* action. The Takings Clause defines its own remedy—just compensation—and the Tucker Act, 28 U.S.C. §1491, provides a forum for that remedy to be obtained from the United States. Thus, "special

factors" exist that preclude creating *Bivens* liability for *any* Takings Clause violation.

Bivens liability for violations of a particular constitutional right will not be created where there are "special factors counseling hesitation in the absence of affirmative action by Congress." See *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). On several occasions, the Court has found the existence of congressionally created remedies for the constitutional violation to be a special factor counseling hesitation and precluding a *Bivens* claim against individual officers. See, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 378-380, 389-390 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412, 420-425 (1988).

The case against *Bivens* liability for a Takings Clause violation is perhaps even stronger than in these previous cases, because here the constitution itself defines a remedy. That is, no matter what the full contours of the Takings Clause's protections may be, the remedy for any violation of the Takings Clause is implicitly defined by the clause itself: "just compensation." U. S. Const., Amdt. 5. And through the Tucker Act, Congress has provided a judicial forum for plaintiffs to obtain that remedy from the United States. See 28 U.S.C. §1491. The fact that the constitution itself defines a remedy for Takings Clause violations indicates that a broader remedy should not be judicially created. Where Congress has specifically provided means to seek this remedy against the United States, but not individual officers, the judiciary should not create alternative means to proceed against officers individually—especially where the same remedy that can already be had from the United States.

Indeed, the availability of a constitutionally defined remedy through a suit against the United States makes fashioning *Bivens* liability against individual officers particularly inappropriate. The Court has acknowledged that a factor—though far from a dispositive one—in determining whether a

Bivens claim may be brought is whether remedies under a *Bivens* claim would be more effective than those under pre-existing causes of action. See *Carlson* v. *Green*, 446 U.S. 14, 18-23 (1980) (recognizing and applying this factor); but see *Bush*, 462 U.S., at 368, 372 (denying *Bivens* liability even while acknowledging superiority of *Bivens* remedies). But here, given that the right in question dictates it own remedy—*i.e.*, just compensation—it is no more effective for plaintiffs to seek that remedy from individual officers instead of from the United States. In fact, the United States' financial resources make it the best source of compensation for Takings Clause violations.

For these reasons, it is unnecessary for the Court to consider whether the APA independently precludes *Bivens* liability in this case. Although *amici* are generally inclined to agree with the petitioners' reasoning on the *Bivens* issue, they believe that this issue can be determined without reference to the APA.

And it should not even be necessary to explain how, even if respondent's view of the Takings Clause were correct, it was in no way clearly established law. To accept that such novel principles were "clearly established law" would be to nullify the doctrine of qualified immunity altogether.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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